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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 449.

REGULAR COMMON CARRIERS CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

vs.

HANCOCK TRUCK LINES, INC.

Appeal from the District Court of the United States for the Southern District of Indiana.

BRIEF FOR APPELLANT.

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SUBJECT INDEX.

Cases Cited.

Statutes Cited.

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BRIEF FOR APPELLANT.

I.

REFERENCE TO OFFICIAL REPORT OF OPINION BELOW.

No opinion was delivered in the court below. The special findings of fact and conclusions of law filed and the judgment entered in the court below are not officially reported, but are set forth in full in the Transcript of Record (R. 65, 74).

II.

GROUNDS UPON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

The judgment of the district court was entered May 25, 1944 (R. 74). The petition for appeal (R. 81, 82) was filed July 22, 1944, and the order allowing the appeal (R. 84) was entered the same day. On November 6, 1944, this court noted probable jurisdiction (R. 150). Jurisdiction is conferred on this court by Act of Congress of March 3, 1911, Chapter 231, Sec. 210, 36 Stat. 1150, and by the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 220, United States Code, Title 28, Sec. 47a, section 210 of Judicial Code.

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

This action arises under the Fifth Amendment to the Constitution of the United States and under the law of the United States, 54 Stat. 916, Section 17 (9) of Part I of the Interstate Commerce Act, United States Code, Title 49,

Sec. 17 (9), Section 205 (g) of Part II of the Interstate Commerce Act, 49 Stat. 550, 54 Stat. 922, United States Code, Title 49, Sec. 305 (g); and Act of Congress October 22, 1913, Ch. 32, 38 Stat. 219, 38 Stat. 220, United States Code, Title 28, Sec. 41 (28), 43-48, 45a and 47a.

The jurisdiction of the Supreme Court of the United States is further invoked on the grounds that this Appellant participated in the proceedings before the Interstate Commerce Commission and is a party in interest therein; that the order of the Commission issued in the said proceedings has been vacated and set aside and the enforcement thereof is permanently enjoined by the findings of the lower Court herein. That by reason thereof Appellant is an aggrieved party within the meaning of Section 47 (a), Title 28, U. S. C.

The jurisdiction of the Supreme Court of the United States is further invoked on the grounds that Section 205 (g), Part II of the Interstate Commerce Act, U. S. C. 49, 305 (g), provides that any final order made by the Interstate Commerce Commission under said Act shall be subject to the same right of relief in Court by any party in interest as is now provided in respect to orders of the said Commission under Section 17 (9) of Part I of the Interstate Commerce Act, 49 U. S. C. 17 (9).

The jurisdiction of the United States is invoked on the further grounds that the judgment of the District Court (R. 74) which granted Appellee's petition (R. 1) for an order to vacate, set aside and permanently enjoin the enforcement of a certain order of the Interstate Commerce Commission entered August 4, 1943, in its Docket No. MC 3339 entitled Globe Cartage Company, Inc., Common Carrier Application (R. 40-50) is illegal, void and contrary to law and thereby adversely affects this Appellant's interest in this cause.

The order of the Interstate Commerce Commission entered August 4, 1943, in its Docket No. MC 3339 entitled Globe Cartage Company, Inc., Common Carrier Application (R. 40-50) is reported at 42 M. C. C. 547.

III.

STATEMENT OF THE CASE.

This is an appeal from the judgment of a three-judge court, which declared illegal and void an order of the Interstate Commerce Commission, made August 4, 1943, in Globe Cartage Company, Inc., Common Carrier Application No. MC-3339 (42 M. C. C. 547) granting Appellee a certificate of public convenience and necessity to operate as a common carrier by motor vehicle under the Motor Carrier Act, 1935 (49 Stat. 543, 49 U. S. C. Sec. 301 et seq., 49 U. S. C. A., Sec. 301 et seq.), now designated as Part II of the Interstate Commerce Act (54 Stat. 919). Appellee filed an application for a certificate of public convenience and necessity as a common carrier under the "grandfather" clause of Section 206(a) of the Act. That section provides that if the common carrier or its predecessor in interest "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time", it shall be granted a certificate without more, and Section 208 (a) provides that the Commission "shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, to which the common carrier is authorized to operate"; (R. 90, 97). The said application alleged a bona fide operation by Appellee as a common carrier of property by motor vehicle on, prior and subsequent to June 1, 1935, over the routes and between the fixed termini set forth in the said application.

as well as the intermediate and off-route points claimed to be served in that period.

In due course said application was set down for hearing before an Examiner of the Interstate Commerce Commission. After evidence was heard and received and report made to the Commission by the Examiner, the Interstate Commerce Commission, Division 5, did, on the 7th day of October, 1942, order (41 M. C. C. 313) that Globe Cartage Company, Inc., was entitled to continue operations as a common carrier by motor vehicle of general commodities over certain routes between certain fixed termini and to serve certain intermediate and off-route points by reason of having been so engaged on, prior and subsequent to June 1, 1935 (R. 12, 89).

Prior to the order of the Interstate Commerce Commission, Division 5 (R. 12, 89) supra, and on May 16, 1942, in a proceeding styled Hancock Truck Lines, Incorporated —Purchase—Globe Cartage Company, Inc. (38 M. C. C. 382), the Interstate Commerce Commission approved the purchase by Hancock Truck Lines, Incorporated, of the common carrier operating rights of Globe Cartage Company, Inc., making the following finding (38 M. C. C. 386):

"We find that purchase by Hancock Truck Lines, Incorporated, of common-carrier operating rights of Globe Cartage Company, Inc., upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, is a transaction within the scope of section 5 (2) (a) and will be consistent with the public interest, and that, if the transaction is consummated, and pending determination of Globe's 'grandfather' applications in Nos. MC-3339 and MC-3340, Hancock shall be entitled to conduct the common-carrier operations lawfully conducted under the 'grandfather' clause pursuant to those applications, and will be entitled to a certificate covering any 'grandfather' common-carrier rights which may be confirmed as a result of those applications,

> which rights are herein authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated; provided, however, that, if the authority herein granted is exercised, Hancock Truck Lines, Incorporated, shall immediately write off to surplus account the amount properly assignable to its 'Other Intangible Property' account as a result of the transaction. An appropriate order will be entered." (R. 99, 104.)

It will be seen, therefore, that Hancock Truck Lines, Incorporated, was authorized by the Interstate Commerce Commission to acquire any "grandfather" common-carrier rights which may be confirmed in Globe Cartage Company, Inc., and that such acquisition was approved prior to the final determination of the 'grandfather' rights of the latter by the Interstate Commerce Commission. Upon the entry of the order of the Interstate Commerce Commission, Division 5, in Globe Cartage Company, Inc., supra, various parties who protested the granting of the said application at the hearing thereon and intervenors who appeared in support of the said protestants, filed with the Interstate Commerce Commission petitions for reconsideration by the Commission en banc of the order (41 M. C. C. 313) of its Division 5, said petitions being described as follows:

> Petition of Railroad Protestants in Central Freight Association Territory, Official Classification Territory, Southern Freight Association Territory, Southwestern Territory (R. 105).
>
> Petition of the Cleveland, Columbus & Cincinnati Highway, Inc., Motor Express, Inc., and Motor Express, Inc., of Indiana (R. 107).
>
> Petition of Regular Common Carrier Conference of the American Trucking Associations, Inc. (R. 120).

Globe Cartage Company, Inc., filed its replies to all of the above described petitions (R. 115, 125).

The Commission en banc after consideration of the said petitions hereinabove referred to entered its order (42 M. C. C. 547) on the 4th day of August, 1943 (R. 40) modifying the order of its Division 5 (R. 12, 89), supra, in the following respects:

Whereas the order of the Interstate Commerce Commission, Division 5, supra, had not made any limitation as to the type of carriage to be performed by Globe Cartage Company, Inc., as a common carrier, the Commission en banc ordered that the said company was entitled to a certificate of public convenience and necessity authorizing operations as a

> "common carrier of general commodities except commodities in bulk, and those of unusual length, width or weight which are at the time moving on bills of lading of freight forwarders, between the points and in the manner described in the findings in the prior reports."

On October 29, 1943 Hancock Truck Lines, Inc., successor in interest to Globe Cartage Company, Inc., by reason of the aforesaid purchase of the latter's operating rights filed its "Petition for Reconsideration and Brief in Support Thereof" (R. 127) in which said petition the said Hancock Truck Lines states:

> "Applicant requests said reconsideration in the following respects only, and for the following reasons:
>
> "The Commission erred, in denying the grant of the use of all of the operating routes to applicant, and, in denying applicant the right to serve all of the points and places as applied for in its 'Grandfather' application and, by granting only a portion of such applied for operating routes, points and places" (R. 127).

In its Petition for Reconsideration by the Commission en banc of the order of its Division 5, Hancock Truck

Lines, Inc., did not complain against the restriction that would limit its service to the transportation of property moving on bills of lading of freight forwarders. We say this for the reason that in the said petition, the following language appears:

> "We do not challenge, nor do we complain against, the restrictions to serve only freight forwarders. We give up our claims to serve others, painful as this limitation is (R. 129). Our assumption during the 'Grandfather' period was to transport for freight forwarders" (R. 130).

It is as the result of the order of the Interstate Commerce Commission denying reconsideration of the order (42 M. C. C. 547) and denying a further postponement of the effective date thereof as prayed by Hancock Truck Lines, Inc., that the said Hancock Truck Lines, Inc., brings this case into Court on plaintiff's petition (R. 1). The transcript of testimony taken before the Interstate Commerce Commission's Examiner on hearing was not introduced in evidence before the lower court. However, the order (41 M. C. C. 313) of the Interstate Commerce Commission, Division 5 (R. 12), makes the following finding of fact:

> "Applicant was incorporated under the laws of Indiana, in 1931. It has been engaged in the transportation of freight for the Universal Carloading & Distributing Company, hereinafter called Universal, under written contracts since prior to June 1, 1935. In addition to serving Universal, it also claims to have been operating for other shippers, under contract, transporting such commodities as magazines (packed in mail bags), leather, printed matter, paper, bottles, and alcoholic beverages. The names of the persons for whom such operations are claimed to have been performed were not disclosed, and no showing was made as to the extent of such service, the time when it was begun, the points served, the frequency of the

service, or the arrangements under which the operations were conducted. In addition, we observe that, out of several thousand trips shown of record both prior and subsequent to June 1, 1935, not one relates to service other than that performed for Universal. The burden of proof in support of a claim of an operating right under the 'grandfather' clauses of sections 206 (a) and 209 (a) of the act rests upon applicant both as to the character and scope of its operations, both on and since the respective statutory dates. On the present records, we must conclude that applicant has failed to establish that it has served any shippers other than Universal" (R. 13).

The above finding of fact by the Interstate Commerce Commission, as well as the "Petition for Reconsideration in Behalf of Hancock Truck Lines, Inc." (R. 127), in which the latter makes no complaint against the restriction to serve only freight forwarders clearly indicates that on, prior and subsequent to June 1, 1935 Globe Cartage Company, Inc., as predecessor in interest to Hancock Truck Lines, Inc., was engaged solely in the transportation of general commodities moving on bills of lading of freight forwarders.

IV.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

The appellant will urge the following assigned errors specified both in its assignment of errors and in its statement of points ~~to be~~ relied upon (R. 146, 147):

The United States District Court for the Southern District of Indiana erred:

1. In not dismissing plaintiff's complaint.

2. In setting aside and enjoining the Commission's order of August 4, 1943.

3. In making and entering findings of fact and conclusion of law in the form and substance adopted by the Court.

4. In refusing to adopt the findings of fact and conclusions of law submitted by the defendants.

5. In making and entering its order of injunction dated May 26, 1944, holding that that part of the Commission's order which confines authorized operations by Hancock Truck Lines, Inc., as successor in interest of Globe Cartage Company, Inc., to commodities "which are at the time moving on bills of lading of freight forwarders" is illegal and void, and enjoining enforcement of the same.

6. In holding, as indicated in the Court's finding of fact No. 19, that the report and order of the Commission as issued August 4, 1943, are not supported by the facts found in said report; that said order is discriminatory against the plaintiff; or that it in any way unlawfully restricts plaintiff in the performance of its public duties.

7. In failing to find that the evidence supports the Commission's findings that during the "grandfather" period

the Globe Cartage Company, Inc., served only a freight forwarder and carried only goods which were moving on bills of lading issued by a forwarder.

8. In giving consideration, as the basis of its decree of May 25, 1944, to the history and characteristics of the plaintiff Hancock Truck Lines, Inc., and its operations, and to the statements and conclusions of Division 5 in its report of May 16, 1942, in MC-F-1743, approving the purchase of the Globe by the Hancock, as indicated in the Court's findings of fact as a whole, and particularly in findings Nos. 3, 14, 15, 16, 17 and 18.

9. In holding, as indicated by the Court's finding of fact No. 19, that the Commission's order imposed a limitation which could not be sustained in the absence of a finding by the Commission under Section 208 of the Interstate Commerce Act that such limitation was a reasonable limitation required by the public convenience and necessity.

10. In failing to hold that the Commission's order as issued was authorized under that portion of Section 208 of the Interstate Commerce Act which requires the Commission to "specify the service to be rendered" in a certificate issued under Section 206 of that Act.

11. In holding, contrary to the Commission's decision, that the restriction imposed by the Commission was inconsistent with Globe's common carrier status.

12. In failing to hold that the Commission was authorized to issue a certificate to a common carrier limited, in accordance with Section 203 (14), to the transportation of a particular class of property, viz., property moving on bills of lading of freight forwarders, that being the only class of commodities which the Commission found was being transported by applicant during the "grandfather" period.

13. In weighing the evidence heard by the Commission and making statements of fact in its findings of fact based thereon, instead of limiting its consideration to the question of whether the Commission record contains substantial evidence to sustain the Commission's report and order.

14. In attempting to permit the plaintiff to exercise operating authority other than that issued by the Commission,—authority which would authorize the plaintiff, as successor to the Globe, to perform operations different from those the Commission has found that the Globe was performing on and subsequent to June 1, 1935, the "grandfather" date.

15. In setting aside only the commodity restriction while leaving the rest of the order in effect, and thereby undertaking to exercise the administrative function entrusted to the Commission of determining in the first instance the scope of the operating authority to be issued; instead of setting aside the order as a whole and remanding the case to the Commission for further proceedings, which would have been the proper procedure in case the commodity restriction contained in the order were held to be invalid.

16. In failing either in an opinion or in its findings of fact or conclusions of law to state reasons for its decision or for its final decree.

17. In making the Court's finding of fact No. 2, which states, among other things, that plaintiff's action arose under the Fifth Amendment to the Constitution of the United States.

V.

ARGUMENT.

A.

SUMMARY OF THE ARGUMENT.

The Argument of appellant is directed to the assigned errors which are in turn directed to the conclusions of law and findings of fact of the Court below.

1. The facts of record before the Interstate Commerce Commission in the matter of the Application of Globe Cartage Company, Docket No. MC-3339, fully sustains the findings made and the order entered by the Interstate Commerce Commission in said matter, which said order is the subject of complaint in Plaintiff-Appellee's petition.

2. The findings and order of Division 4 of the Interstate Commerce Commission in Interstate Commerce Commission Docket No. MC-F-1743, being the acquisition matter wherein plaintiff acquired the operating rights of Globe Cartage Company were not conclusive and binding upon the Interstate Commerce Commission in its determination of the Globe Cartage operating rights, and such findings and order of the Interstate Commerce Commission in its Docket No. MC-F-1743 could not in law constitute a determination of the "grandfather rights" which plaintiff acquired by its purchase of Globe Cartage Company.

(a) Findings and orders of Division 4 of the Interstate Commerce Commission are entered pursuant to Section 5 of the Interstate Commerce Act and determine solely the question whether a transfer of operating rights is consistent with the public interest, whereas the determination of "grandfather rights" is made pursuant to the provisions of Section 206 (a) of the Interstate Commerce Act.

(b) Estoppel cannot be asserted as a defense against either the United States or the Interstate Commerce Commission.

3. The Interstate Commerce Commission has the authority, pursuant to the provisions of Part II of the Interstate Commerce Act, to issue a Certificate of Public Convenience and Necessity imposing or placing thereon in a proper case restrictions that limit the carrier to the transportation of "general commodities which are at the time moving on bills of lading of freight forwarders."

(a) The placing of such limitation or restriction on the certificate in the instant case is not a denial of due process of law.

(b) Such restriction is not inconsistent with plaintiff's status as a common carrier.

(c) Plaintiff could not acquire by purchase any greater operating authority than its predecessor was entitled to.

4. The court below exceeded its jurisdiction in substituting its judgment for that of the Interstate Commerce Commission in its findings and order in that

(a) Said Court did not remand said matter to the Interstate Commerce Commission for further proceedings.

(b) Said Court made findings of fact and conclusions of law contrary to the record made before the Interstate Commerce Commission.

B.

TEXT OF ARGUMENT.

The Facts Sustain the Commission's Findings.

We need not treat of this assignment at length as Appellee does not question the sufficiency of the evidence on which the Commission based its findings nor the findings themselves. Appellee has conceded in its "Petition for

Reconsideration'' filed with the Interstate Commerce Commission on November 1, 1943 (R. 127), that the said findings are supported by the evidence. We say this in view of the statement by Appellee in its said petition which is as follows:

> ''We do not challenge, nor do we complain against, the restriction to serve only freight forwarders. We give up our claims to serve others, painful as this limitation is (R. 129). Our assumption during the 'Grandfather' period was to transport for freight forwarders'' (R. 130).

The findings and order (38 M. C. C. 382) of the Interstate Commerce Commission, Division 4, are not determinative of the operating rights of Globe Cartage Company, Inc., or its successor in interest, Hancock Truck Lines, Inc. Appellee has contended in the Court below that the order (38 M. C. C. 382) of the Interstate Commerce Commission, Division 4, approving the acquisition by Hancock Truck Lines, Incorporated, of the operating rights of Globe Cartage Company, Inc., and the authorization for unification of the rights of both now estops the Interstate Commerce Commission from restricting the operations of Globe Cartage Company, Inc., to the transportation of property ''moving on bills of lading of freight forwarders.'' It is further contended by Appellee that the order (38 M. C. C. 382) of the Interstate Commerce Commission, Division 4, should not have been entered approving the purchase by Hancock Truck Lines, Inc., of the operating rights of Globe Cartage Company, Inc., if the Interstate Commerce Commission in the future intended to place a restriction such as that here in issue, upon the operating rights of the latter. That since the Commission has ordered and approved the said purchase and the unification of the operating rights of both companies, it must now order a certificate issued to Hancock Truck Lines, Inc., which would reflect other than a

substantial parity between the future operations by Hancock Truck Lines, Inc., and the prior bona fide operations of Globe Cartage Company, Inc. In acting upon the application by Hancock Truck Lines, Inc., to purchase the operating rights thereafter to be determined, of Globe Cartage Company, Inc., the Commission proceeded under Section 5 of Part I of the Interstate Commerce Act [28 U. S. C., Sec. 305 (2) (a)] which has to do with unifications, mergers and acquisitions of control of motor carriers. This section of the Act has no relation to the determination of operating rights of a motor carrier. Under it the Commission has jurisdiction only to review the terms and conditions of the "proposed unification, merger, acquisition and control" and

> "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable."

The power of the Interstate Commerce Commission to determine "grandfather" rights of a motor carrier is vested in it under Section 206 (a) of the Motor Carrier Act, 1935, now designated as Part II of the Interstate Commerce Act. It is under the latter section of the Act that the operating rights of Globe Cartage Company, Inc., must be determined. In administering the two sections of the Act aforesaid, the Interstate Commerce Commission has pursuant to law organized itself into divisions, Division No. 4 treating of applications filed under the first named section and Division No. 5 treating of applications filed under the second named section. To illustrate the separate powers of the Commission under the sections of the act aforesaid, we call attention to the language of the

Interstate Commerce Commission in Hancock Truck Lines, Incorporated—Purchase—Globe Cartage Company, Inc., 38 M. C. C. 386, in which it is said that Hancock Truck Lines, Incorporated, "will be entitled to a certificate covering any 'grandfather' common carrier rights which may be confirmed as a result of those applications" (R. 104). The Interstate Commerce Commission was there discussing the applications of Globe Cartage Company, Inc., Nos. MC 3339 and MC 3340 which have been the subject of orders of the Commission, 41 M. C. C. 313, 42 M. C. C. 547. The Interstate Commerce Commission did not hold out to appellee that the approval of the purchase aforesaid in any manner extended the scope of the "grandfather" rights of Globe Cartage Company, Inc. It was merely found that the said purchase would be "consistent with the public interest" and that the rights of the two companies might be unified. The Commission in that case went on further to say "the nature and extent of the service which Hancock may render in conducting operations under the unified rights must be governed by the existing rights as confirmed and lawfully claimed" (R. 103). Throughout its order, Division 4 continually put the parties on notice that it was treating only of the claimed rights of Globe Cartage Company, Inc., as a common carrier under the "grandfather" clause. For example, the Division 4 report further states:

"In No. MC-3339, it claims rights as a common carrier, serving all intermediate points, over routes, in territory bounded on the east by Buffalo, N. Y., and Pittsburgh, Pa., on the south by Wheeling, W. Va., Columbus and Cincinnati, Ohio, Louisville, and Evansville, on the west by St. Louis, and Peoria, Ill., and on the north by Chicago, Detroit, Cleveland, Ohio, and Erie, Pa.; and in No. MC 3340 it claims rights as a contract carrier for Universal Carloading & Distributing Company, a forwarding company, between the same points and over the identical routes. For the purpose of this proceeding, only the operations of

Globe as a common carrier will be considered, and our findings will authorize purchase only of its rights to operate as a common carrier. Hemingway Bros. Interstate T. Co.—Purchase—Finkel Motor, 15 M. C. C. 702" (R. 101).

In its administration of the provisions of the Interstate Commerce Act affecting motor carriers, the Interstate Commerce Commission was faced with the necessity of receiving and determining applications filed under the provisions of former Section 213* of the Motor Carrier Act, 1935, and present Section 5 of Part I of the Interstate Commerce Act prior to the final determination of the scope of the "grandfather" rights sought to be acquired. Obviously the Commission could not under these circumstances determine any other question than whether the acquisitions of claimed rights would be consistent with the public interest. It is clear that there is no merit to the contention of Appellee that the acquisition by Hancock Truck Lines, Inc., of the claimed operating rights of Globe Cartage Company, Inc., affected in any manner the scope of operating rights of the latter as a common carrier.

Estoppel Cannot Be Asserted Against the Commission.

Appellee contends the Commission is estopped from limiting its service to the transportation of property moving on bills of lading of freight forwarders by reason of its order entered in Hancock Truck Lines, Incorporated—Purchase—Globe Cartage Company, Inc., 38 M. C. C. 382. Appellee has been sustained in its contention by the lower court in its findings Nos. 12, 13, 14, 15, 16, 17 and 18. (R. 69, 70, 71, 72).

The record before the Commission is devoid of any evidence proving or tending to prove that either of the de-

*Repealed by Public Act No. 785, 76th Congress, Section 21 (e), approved September 18, 1940 (Transportation Act, 1940).

fendants United States of America or the Interstate Commerce Commission was guilty of estoppel by reason of the orders entered in the instant case or in Hancock Truck Lines, Incorporated—Purchase—Globe Cartage Company, Inc., 38 M. C. C. 382. Further, we submit that such contention may not be urged against either of the defendants as a matter of law. Cummings v. Societe Suisse Pour Valeurs de Mataux, 85 Fed. (2d) 287, 289, certiorari denied 306 U. S. 63; Utah Power & Light Co. v. United States, 243 U. S. 389, 409; United States v. City and County of San Francisco, 310 U. S. 16, 31.

The Interstate Commerce Commission Is Empowered to Impose Restrictions on Certificates of Public Conveniences and Necessity Limiting a Common Carrier to the Transportation of Property Moving on Bills of Lading of Freight Forwarders.

We come now to the substantial question presented by this appeal, that is, the power of the Commission to limit or restrict the operations of a common carrier to the transportation of freight moving on bills of lading of freight forwarders. On behalf of Appellee it is contended that such restriction is void as being in conflict with the terms of Section 208 of the Motor Carrier Act, 1935 (Title 49, U. S. C. A. 308). Appellant vigorously urges that the Commission under said section of the Act is not only empowered, but it is directed by Congress to limit or restrict Certificates of Public Convenience and Necessity issued to common carriers so as to accurately reflect the operations of said carriers conducted on and prior to June 1, 1935. This Court has held that the Commission is so empowered in Alton R. Company et al. v. United States, 315 U. S. 15, 62 S. Ct. 432, 437, and United States v. Carolina Freight Carriers Corporation, 315 U. S. 475, 62 S. Ct. 722, 726. In the latter case this Court said:

"As we indicated in Alton R. Company v. United States, supra, the purpose of the 'grandfather clause,' was to assure those to whom Congress had extended its benefits a 'substantial parity' between future operations and prior bona fide operations (315 U. S. 22, 62 S. Ct. 437, 86 L. Ed. ...)."

The test here then is whether the Commission's order results in a "substantial parity between future operations and prior bona fide operations" conducted by Globe Cartage Company, Inc. As we have heretofore said, Appellee has without question admitted, and we think will not now seriously contend otherwise, that the operations of Globe Cartage Company were confined solely to the transportation of property moving on bills of lading of freight forwarders. While we have heretofore pointed out this fact in our first assignment, we will, in view of the importance of the question involved, reiterate admissions made by Appellee during the various stages of the proceedings before the Commission. The "Petition for Reconsideration" filed with the Commission by Appellee (R. 127, 129) indicates that it entirely waived the question of the restriction about which it now complains, saying:

"We do not challenge, nor do we complain against, the restriction to serve only freight forwarders."

Again in the same petition Appellee, speaking of the restrictions and limitations imposed by the Commission in the Certificate of Public Convenience and Necessity authorized to be issued, said:

"At every point and place claimed, our trucks were made available for transportation at all times. The delineated analysis of the proof in the Division 5 Report of August 4, 1943, indicates this beyond doubt. Point by point, city by city, that Report, beginning with the last paragraph on the bottom of sheet 5 thereof and continuing through the third paragraph on sheet 9, proclaims loudly that, measured—by what

freight forwarders made available for transportation—we transported. This, notwithstanding freight forwarders, did not always maintain a flow of traffic for us to transport at each point or between each point every day, or every week, or even every month.

"When they did have traffic for us to transport even with breaks in between of half a year or even a year, we were 'Johnny on the spot,' and we carried out our burden and we did transport According to Our Holding Out.

"It is in this light that our proof must be assayed. Our assumption during the 'Grandfather' period was to transport for freight forwarders" (R. 130).

There can be no question therefore as to the character of the transportation service performed on and prior to June 1, 1935, by Globe Cartage Company, being that of transporting exclusively property which moved on bills of lading of freight forwarders, and that its holding out was so limited. This being true the Commission rightly provided for a restriction accordingly, which said restriction results in the establishment of "substantial parity between future operations and prior bona fide operations." Alton R. Company v. United States, supra.

Appellee contends, however, that the maintenance of such "substantial parity" in this case is unlawful and irregular; that the Commission exceeded its powers, this despite the fact that without such restriction appellee's operation would be enlarged and expanded without proof of "public convenience and necessity," and without regard for its own self-imposed restriction.

Appellant respectfully submits that Section 208 (a) of the Motor Carrier Act, 1935, as amended, requires that any certificate issued pursuant to an application filed under the provisions of Section 206 (a) of the said Act must "specify the service to be rendered." Thus the Commission is, under this provision of the Act, empowered and required by Congress to place a restriction in any certificate to be

issued to Appellee, which said restriction shall reflect the type of service rendered on or prior to June 1, 1935. In view of the type of carriage performed by Appellee, the Commission must pursuant to the mandate of Congress limit the Certificate of Public Convenience and Necessity to be issued in the instant case so that Appellee will be confined to the transportation of property moving on the bills of lading of freight forwarders. The limitation ordered to be placed in Appellee's Certificate of Convenience and Necessity is not one limiting the transportation service to be performed to a specified shipper or shippers. Rather the limitation defines or specifies the type of service to be rendered in the same manner as the Commission has in other cases limited a common carrier to the transportation of particular commodities, illustrations of which may be the limitation of Certificates of common carriers to the transportation of petroleum products, livestock or household goods. Since its order in the Globe Cartage Company, Inc., case, supra, the Commission, Division 5, has entered an order in Mutual Trucking Company Common Carrier Application, Docket No. MC 3456, decided November 11, 1943.* In that case the Commission restricted the Certificate ordered to be issued to the carriers involved to the transportation of property moving on bills of lading of freight forwarders. At Sheet 6 of its report in that case, the Commission cited with approval its order in Globe Cartage Company, Inc., supra, saying:

> "For reasons stated in **Globe Cartage Company, Inc., Common Carrier Application**, ... M. C. C. ... (decided August 4, 1943), the authority granted herein will authorize operations as a common carrier by motor vehicle of general commodities which are at the time moving on bills of lading of freight forwarders."

*This report also embraces No. MC-3456 (Sub-No. 2), Mutual Trucking Company Extension—Bridgeport, Conn.; No. MC-3455, Mutual Trucking Company Contract Carrier Application; No. MC-13900, Midwest Haulers, Inc., Common Carrier Application, and No. MC-13900 (Sub-No. 2), Midwest Haulers, Inc., Extension—Baltimore. This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

The said order has become a final order of the Commission. Throughout its administration of the Act, the Commission has exercised its power to impose restrictions and limitations in Certificates of Public Convenience and Necessity issued to motor carriers. As illustrations of the exercise of this power, the following cases are typical.

In Galveston Truck Lines Corp., 22 M. C. C. 451, l. c. 467, the Commission said:

> "The evidence shows, however, that applicant sought to select its shippers and traffic and only accepted such traffic as it considered desirable, refusing, it is stated, more than was accepted. Although the volume of business which a shipper could offer was an important consideration, it appears that the type of traffic also was given consideration by applicant in the acceptance of a shipper's account. We conclude that applicant's discriminating policy has had a definite effect upon the variety of commodities transported, and should be given consideration in our determination of this issue."

The above language in Galveston Truck Lines Corp., supra, is cited with approval by this Court in United States v. Carolina Freight Carriers Corp., supra, l. c. 483. The provisions of Section 208 of the Motor Carrier Act, 1935, as amended, which require that any certificates issued under Sections 206 or 207 thereof shall "specify the service to be rendered" are comparable to the provisions of Section 209 (b) of the Act wherein it is provided with reference to the issuance of permits to contract carriers by motor vehicle that "the Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof."

In Noble v. United States et al., 319 U. S. 88, 63 S. Ct. 950, this Court reviewed an order issued by the Interstate Commerce Commission restricting a permit issued the car-

rier there involved so as to limit its transportation service to that "under individual contracts" with persons who "operate food canneries or meat packing business." This Court sustained the Commission's order holding that the Commission was empowered to place restrictions in a permit of the nature involved, saying at 319 U. S., l. c. 91, 92, 63 S. Ct. 952:

> "An accurate description of the 'business' of a particular contract carrier and the 'scope' of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate definition frequently can be made only in terms of the type of class of shippers served. Unless the words of the Act are given that interpretation, permits under the 'grandfather' clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodities for all comers, merely because he has carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that 'substantial parity between future operations and prior bona fide operations' which is contemplated by the Act (Alton R. Co. v. United States, 315 U. S. 15, 22, 62 S. Ct. 432, 436, 86 L. Ed. 586) would be frequently disregarded. The 'grandfather' clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion for all practical purposes of this contract carrier into a common carrier—

a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See Sec. 206 (a), Sec. 207, and Sec. 209 (b)."

Unless the Commission be empowered to place restrictions and limitations in Appellee's Certificate, it would reflect an operation entirely different than that conducted on and prior to June 1, 1935 and thereby Appellee's prior activities would be greatly distorted.

Appellee contends that the restriction here imposed does violence to the term "common carrier." Such is not the case. The peculiar nature of the business of a freight forwarder was discussed by the Commission en banc in Charles Bleich, 27 M. C. C. 9 (prior report by Division 5, 14 M. C. C. 662). At pages 15 and 16 of its decision in that case, the Commission said:

"The forwarder is not like an ordinary shipper who tenders its own goods to a carrier for transportation. It merely tenders for transportation freight belonging to the general public, which it has accepted and assembled as the result of an understanding with many shippers or consignees that it will undertake to have the same transported to ultimate destinations. Its primary characteristic is that of a carrier, and only as an incident to its common-carrier obligation does it assume the apparent status of a shipper, much the same as any common carrier by motor vehicle which accepts a piece of freight for delivery beyond its terminus and forwards the same over the line of a connecting carrier thereby becomes a shipper as to that particular transportation."

Through its service to freight forwarders, Appellee is transporting property tendered by the general public to

the freight forwarder for transportation. It is entirely consistent therefore that the Commission determine in this case that applicant may be limited to the transportation of property moving on bills of lading of freight forwarders, and at the same time have the status of a common carrier. Congress has in fact affirmed by statutory enactment the findings of the Commission that common carriers who on the critical date were engaged solely in transporting property moving on bills of lading of freight forwarders should be limited to that type of operation in the future by recognizing such transportation as a special and individual class of service similar to the service by common carriers in the transportation of petroleum products, household goods, livestock and other traffic of that type. In 49 U. S. C. 1018, Section 418, Part IV, of the Interstate Commerce Act, Congress has provided that:

> "It shall be unlawful, except in the performance within terminal areas of transfer, collection, or delivery services, for freight forwarders to employ or utilize the instrumentalities or services of any carriers other than common carriers by railroad, motor vehicle, or water, subject to this chapter and chapters 1, 8, and 12 of this title;"

Appellee does not contend that the standard by which its operations were judged was improper. We submit that the Commission in its order in this case applied the proper statutory standard in defining the nature of appellee's business and its scope. Since this is the case, this Court will not disturb that finding. As was said in Noble v. United States et al., supra, 319 U. S., l. c. 92, 93, 63 S. Ct. 952:

> "Since the Commission did not apply an incorrect standard in defining the nature of appellant's business and its scope, our function is at an end. The precise delineation of an enterprise which seeks the protection of the 'grandfather' clause has been re-

served for the Commission. United States v. Maher, 307 U. S. 148, 59 S. Ct. 768, 83 L. Ed. 1162; Alton R. Co. v. United States, supra; United States v. Carolina Freight Carriers Corp., supra."

This Court has consistently recognized that the Commission is a body of experts whose judgment on the intricacies of transportation problems is to be given great weight. As was said in United States v. Carolina Freight Carriers Corp., 315 U. S., l. c. 489, 490, 62 S. Ct., l. c. 730:

"We express no opinion on the scope of the certificate which should be granted in this case. That entails not only a weighing of evidence, but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission. United States v. Maher, supra; Alton R. Co. v. United States, supra. Our task ends if the statutory standards have been properly applied."

The Commission having exercised its power "to specify the service" to be performed by Appellee pursuant to the mandate of Congress, the Court should not disturb that finding. In view of what has been said, it will be apparent that Appellee has not been deprived of its property without due process of law.

The Court Below Exceeded Its Jurisdiction.

As pointed out above in the last-quoted language in the case of Noble v. United States et al., supra, this Court is limited in its consideration of this case to a determination of the question as to whether or not a correct statutory standard was applied by the Commission in the issuance of its order. We submit that the standard as applied was that prescribed by the statute.

Appellee's complaint (R. 11) before the Court below attacked the order of the Commission en banc (R. 40-50, Ex. B, R. 89-90) on the following grounds:

(1) That that part of the final order of the Commission which restricts Appellee to the transportation of freight moving on bills of lading of freight forwarders is illegal and void as exceeding the powers of the Commission:

(a) Because the Commission had found that appellee, Hancock Truck Lines, Inc. (successor in interest to Globe Cartage Company, Inc.), was a common carrier by motor vehicle on June 1, 1935, and continuously since said date.

(b) Because the restriction imposed and complained of is an unlawful and illegal restriction, not authorized by law and will deprive appellee (plaintiff below) of its property without due process of law.

(c) Because the restriction is a violation of Sec. 206 of the Motor Carrier Act.

As previously indicated in our brief the record made before the Commission in the instant case was not introduced in evidence before the lower court. That Court had before it the various pleadings filed and the Report and Order of the Commission, Division 5, in Docket No. MC-3339, October 7, 1942 (R. 12-40) and the Order of the Commission en banc on Reconsideration August 4, 1943 (R. 40-50), which last mentioned order is the order complained of. Beyond the two orders referred to, the Court was in no wise furnished with proof that the Commission's findings and order were not substantiated by evidence of record. In truth and in fact, the order of the Commission en banc (R. 40-50, Ex. B, R. 90, 91) definitely recites and finds as a fact that Globe has "transported only traffic tendered to it by the Universal Carloading Company," a freight forwarder. The order then recites the reasons for imposing the restriction or limitation.

As pointed out elsewhere in our brief, Appellee in its Petition for Reconsideration (R. 127-144, Ex. 6, R. 98), filed on November 1, 1943, attacking the order of the Commission en banc (R. 40-50, Ex. B, R. 90, 91) has admitted

that its only holding out, its only service performed was "to transport for freight forwarders."

With only the above orders before it, with no proof or evidence tending to prove that Appellee (plaintiff below) ever held itself out or transported for the general public, and with the admissions of the Appellee, all as its sole guide, the Court below sought to substitute its judgment for that of the Commission in contravention of the express mandate of this Court in the cases Noble v. United States, supra, and United States v. Carolina Freight Carriers Corporation, supra, by making its findings of fact and conclusions of law (R. 65-73) and entering its order (R. 74) thereon.

The Court below erred and exceeded its jurisdiction in the following, among other respects:

(1) The Court failed in its Findings Nos. 5 and 6, to note that Division No. 5 of the Interstate Commerce Commission found that "applicant has failed to establish that it has served any shippers other than Universal" (Universal Carloading and Distributing Company, a freight forwarder.)

(2) The Court failed in its Finding No. 9, to refer to the finding by the Commission en banc, in its order of August 4, 1943 (R. 40-50, Ex. B, R. 90), that Globe has "transported only traffic tendered it by the Universal Carloading & Distributing Company."

(3) The Court failing to consider the finding of the Commission en banc, supra, erroneously stated in its Finding No. 10 that "**contrary** to the findings" set out in Finding No. 9 of the Court below, the Commission placed certain restriction in its order of August 4, 1943 (R. 50-50, Ex. B, R. 90). The Court below exceeded its jurisdiction in this instance for:

(a) It infringed upon the right reserved to the Commission alone in weighing and considering evi-

dence and with no evidence whatsoever before, it the Court has arbitrarily, capriciously and without reason, attempted to make a finding of fact wholly unwarranted by the record before it.

(b) The Court below has substituted its judgment for that "expert judgment" of the Commission respecting the character and nature of the relationship which obtains between a freight forwarder and a common carrier.

(4) The Court below has exceeded its jurisdiction in classifying freight forwarders as shippers, contrary to the express findings of the Commission in its order of August 4, 1943 (R. 40-50; Ex. B, R. 90), and contrary to the classification and definition of Congress in Part IV of the Interstate Commerce Act, 49 U. S. C. 1001-1022.

(5) The Court below was in error and exceeded its jurisdiction in its Finding No. 14, in failing to distinguish between the rights which Appellee (plaintiff below) acquired by virtue of its acquisition of Globe Cartage Company, Inc., and the rights which it, the Appellee, had by virtue of its own operations.

(6) The Court below further erred and exceeded its jurisdiction in each and every particular of its Finding No. 14 (R. 70), as there was no evidence of record proving or tending to prove any of the matters set out in said Finding No. 14.

(7) The Court below erred and exceeded its jurisdiction in making its Findings Nos. 15, 16, 17 and 18 (R. 70, 71, 72) and in giving consideration to the matters and things therein set out, for:

(1) The matters therein set out were not in issue in this cause, the sole issue being the matter of restriction placed upon the certificate issued Appellee under the claimed "grandfather" rights of Globe Cartage Company.

(2) The Court sought to substitute its judgment for that of Congress, in that it sought to apply a different standard than that set up by Congress to determine the scope of a certificate issued under the "grandfather" clause of the Act, as is evidenced by the statements in its Finding No. 18 (R. 72), wherein appears the following language:

> "If that part of the order complained of by the plaintiff is enforced, all of the business which plaintiff has built up under said unification order of May 16, 1942, will be destroyed, and plaintiff will be put back to the position which Globe was in when said order was entered."

The Court in the said finding No. 18 erroneously reasons that although Globe Cartage Company transported for freight forwarders only, that nevertheless the acquisition of its rights by Hancock Truck Lines, Inc., which carrier served the general public, resulted in an enlargement of the rights of the former.

(8) The Court erred and exceeded its jurisdiction in its Finding No. 19 (R. 73), wherein it recited that:

> "The Commission has made no finding of fact that the restriction complained of in the complaint is a reasonable term, condition or limitation required by the public convenience and necessity; nor has it found as a fact that it will be consistent with the public interest to place such restriction in said order; nor has it found that good cause exists for changing said order of May 16, 1942.
>
> "That part of the order complained of herein is not sustained or justified by any fact found by the Commission, and there is no rational basis for its support; said part of said order is now found to be discriminatory against the plaintiff, is an arbitrary, unreasonable and capricious restriction upon the rights, duties and privileges of plaintiff as a common carrier of general

commodities by motor vehicle for compensation, will deprive plaintiff of its rights and property without due process of law, and is illegal and void."

for the Court:

(a) Substituted its judgment for that of the Commission in ignoring the fact of record that Globe has transported only freight tendered it by Universal Carloading & Distributing Company as above set out.

(b) States that the Commission made no findings that the restriction complained of is a reasonable term required by the public convenience and necessity, thereby completely failing to consider the nature of the Globe operation as the record before the Court disclosed such operation to have been.

(c) Applies the wrong standard when it refers to the failure of the Commission to find as a fact that the restriction will be consistent with the public interest, such standard not being applicable to a common carrier seeking a certificate under the "Grandfather" clause of the Act.

(d) Confuses the nature of the Division 5 order of May 16, 1942 (R. 99, Ex. F, R. 91), with the order of the Commission en banc (R. 40-50, Ex. B, R. 90), and erroneously assumes as a finding of fact that said order of May 16, 1942, was determinative of the "Grandfather" rights of Globe.

(e) Completely ignores the admissions of plaintiff and the finding of the Commission en banc (R. 40-50, Ex. B, R. 90) that Globe merely held itself out and did only transport freight moving on freight forwarders' bills of lading, and states that that part of the order complained of is not sustained or justified by any fact found by the Commission, and there is no rational basis for its support.

(f) Without assignment of reason, and contrary to all of the evidence before it, states not that the restriction in any case is void, or illegal, but that as to plaintiff "said part of said order is now found to be discriminatory against the plaintiff, is an arbitrary, un-

reasonable and capricious restriction upon the rights, duties and privileges of plaintiff as a common carrier of general commodities by motor vehicle for compensation, will deprive plaintiff of its rights and property without due process of law, and is illegal and void.''*

(9) The Court below erred and exceeded its jurisdiction in that the Court, on the sole basis of the foregoing erroneous, unwarranted and unfounded findings of facts, concluded the law to be:

''That part of the order complained of in the complaint which limits plaintiff's operations as a common carrier of general commodities to those 'which are at the time moving on bills of freight forwarders' is illegal and void, and the defendants should be permanently enjoined from enforcing same'' (R. 73).

Pursuant to the above conclusion of law, the Court below entered its decree (R. 74).

We submit on behalf of appellant that the Court in entering the above conclusion of law and its decree thereon exceeded its jurisdiction and was in error for

(a) If it found as a fact that that part of the order complained of herein is not sustained by the record made before the Commission (which fact is specifically denied), it should have set aside the Commission's order and remanded the cause to the Commission for further proceedings.

The Court below was not empowered to make findings of fact as to matters which Congress has committed to the sole jurisdiction of the Commission.

The Court below acted in direct contravention to the decision of this Court in the case of Noble v. United States, supra.

*Emphasis ours.

(b) The Court below in presuming and arrogating to itself the field of jurisdiction reserved solely to the Commission, has declared as a matter of law that the restriction imposed on the Globe Certificate is void and illegal. In so declaring it has set forth no reason except that the Commission has failed to find certain facts.

The Court below has failed to determine the sole and only issue in the case and that is:

That the Commission is empowered and mandated by Congress to "specify the type of service to be rendered" by common carriers, pursuant to the provisions of Sec. 208 (a) of the Act, 49 U. S. C. 308a.

The Court below has exceeded its jurisdiction in attempting to exercise a jurisdiction reposed in the Commission. In so doing, it has incorrectly applied the standard established by Congress in Sec. 206a of the Act, 49 U. S. C. 306 (a) for measuring "grandfather" rights of common carriers. The Court has in effect declared the standard so established to be null and void as depriving plaintiff of property without due process of law. The Court has overruled the Supreme Court in its holding that the "Grandfather" clause seeks to establish a substantial parity between operations conducted on June 1, 1935 and subsequent thereto. Alton R. v. United States, supra; United States v. Carolina Freight Carriers Corp., supra.

For all of the reasons hereinabove stated, assigned and set out, we submit that the order of the Court below should be vacated, the injunction against the United States and the Interstate Commerce Commission should be dissolved, and that the order of the Commission en banc be affirmed.

Respectfully submitted,

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